LOS ANGELES BAR BULLETIN

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Vol. 30 **October, 1954** **No. 1**

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VOL. 30 OCTOBER, 1954 No. 1

The President's Page

By Harold A. Black
President, Los Angeles Bar Association



Harold A. Black

For a good many years our Association has operated, without any charge to employer or employee, a placement bureau for lawyers, legal stenographers and secretaries. Recently there came to my desk a survey of Bar Association placement services made by the American Law Student Association with the assistance of the American Bar Association. This survey contains a number of reports from State and local bar associations on placement services maintained by them, but it did not mention the service we maintain, which prompts me to speculate on whether many members of our association who might have made use of our service have failed to do so, or indeed whether many members are unaware of its existence. While our Bureau has placed a respectable number of applicants both in the attorney and secretary-stenographer classifications, with satisfaction to employer and employee, I suspect it has not been used to the full extent of its possibilities.

In the July 1951 issue of the *American Bar Association Journal* (page 497), there is an article by Louis A. Toepfer, Assistant Dean, Harvard Law School, on Placement in the Legal Profession: a Responsibility of the Organized Bar. If you maintain a file of

the *American Bar Association Journal,* it would pay you to look up that article and read it. At the time it was written, bar associations as a whole were playing a very minor part in placement activity. Some progress has been made in the last few years but much remains to be done. There are a few bright spots. The Placement Bureau jointly maintained by the two New York associations, city and county, and the service operated by the Chicago Bar Association, have done very effective work and deserve special mention.

There seems to be resistance by some lawyers and firms to the use of our Placement Bureau. It is true that many firms prefer to do their recruiting of young lawyer associates by direct approach to the law schools and do not as a rule need a placement service. Some, however, indicate that they do not use placement services because they do not want to face a flood of applicants and wish to avoid the unpleasant task of turning people away. This is not a valid objection. Our Bureau requires each applicant to fill out a form giving very complete information as to background, education and experience. Unless the prospective employer wishes every applicant to be directed to him, he need not interview anyone except those whose application forms indicate strong likelihood of meeting the qualifications he sets.

Furthermore, most, if not all, firms have many unsolicited calls from law school graduates seeking employment. Very few lawyers refuse an interview, whether they are looking for assistants or not. Why not tell these young applicants about our placement service? And if the need arises for a lawyer assistant or a legal secretary or stenographer, why not at least check with our own placement bureau to see what applications are on file? Our service obviously will become more valuable and effective only by being used more often by our members.

Assisting the young graduate in getting located is a proper function and responsibility of the organized bar, particularly in the large cities. Many problems in public relations and in the establishment of standards of professional ethics can be traced to the difficulty encountered by some individuals in becoming properly assimilated

(Continued on page 32)

Continuing Education of the Bar (Fall, 1954, Series)

Brenton L. Metzler, Chairman of the Los Angeles Bar Association's Committee on Continuing Education of the Bar, announces that the State Bar's fall program on the "Internal Revenue Code of 1954" will be given starting Tuesday, November 4, 1954 at 7:30 P.M.

Five two hour sessions have been scheduled to cover the major changes having significance for the general practitioner. These are:

1. Background and Organization of the Revenue Code of 1954 and Changes Affecting Individuals
2. Changes Affecting Taxation of Partnerships and Partners
3. Changes Affecting Taxation of Corporations and Stockholders
4. Changes in Estate and Gift Taxes and in Taxation of Estate and Trust Income
5. Changes in Accounting Methods, Capital Gains and Losses, Depreciation and Other New Provisions

The lectures will be held in the Council Room, California Teachers Association Building, 612 S. Figueroa Street, and will be given on Tuesdays and Thursdays, November 4, 9, 11, 18 and 23. Because of the high interest of attorneys in the new Code the same lecture course has also been scheduled as a week-end series at the same place on Friday and Saturday, December 3 and 4.

Attorneys who register for the course will receive without any extra charge a copy of the specially bound edition of the Research Institute of America's "1954 Revenue Act Coordinator." This book containing over 800 pages of explanatory analysis sells ordinarily for $24.00. The registration fee will be $15.00, which includes the book.

The course is the latest of the regular series given twice yearly by the Los Angeles Bar Association and the State Bar through the facilities of University of California Extension.

Local members of the State Bar Committee on Continuing Education of the Bar are E. Rufus Bailey and Gordon F. Hampton.

Mr. Bennett W. Priest
Chairman, Bulletin Committee
900 Title Insurance Building
Los Angeles 13, California

Dear Bennett:

We are listing below the names of members of the Bar who volunteered to serve during the month of September on the Federal Courts Criminal Indigent Defense Committee, with the thought that those who devote so much time to such a service without compensation should receive recognition in the press.

Lionel Richman	Louis R. Eglash
William Dalbey, Jr.	Ronald P. Denitz
Lewis Garrett	Phillip W. Silver
Robert Schlesinger	James R. Ross
Max Goodman	Laurence R. Grannis
Samuel Brody	Roger H. Davis
Walter H. Brust	George Zucker
Frank Chuman	Emanuel M. Silver

Franklin D. Laven, Chairman for the month

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Agreements Not to Engage in a Competing Business

By Grover R. Heyler*



Grover R. Heyler

Owners of a business have been able to protect their enterprise from two general sources of competition under common law rules permitting reasonable trade restraints. One of these is competition by former associates or employees. The other is competition from the buyer or seller of a business.[1] Preventing either type of competition may be a matter of business life or death. But California statutes apparently prohibit contracts restraining competition by a former employee, and decidedly restrict contracts against competition which are formed in connection with the sale of a business. Coping with these limitations and with the important tax consequences entailed by a promise not to compete requires that such agreements be given much more detailed consideration than their customary location at the end of contracts indicates they receive.

Employment Contracts

California appellate courts seem never to have ruled on the validity of a contract by an employee or agent not to compete with his employer after the expiration of employment.[2] But since 1872 it has been the declared policy of the state that, with specified excep-

*Grover R. Heyler was born in Manila, Philippine Islands, on June 24, 1926. Within a year his parents returned to the continental United States and established themselves in Los Angeles. Heyler attended public schools in West Los Angeles and entered U.C.L.A. in 1944. Shortly thereafter he entered military service with the U.S. Navy, returning to college in 1946. At U.C.L.A. he was a member of Sigma Alpha Epsilon and was active in student activities, serving as Editor of the Daily Bruin and as a member of the student council. He received his B.A. degree in 1949. After graduation he and Miss Caroline Yarbrough, a classmate, were married. The couple moved to Berkeley where he entered the University of California Law School. While there he worked part-time in the legal office of the Henry J. Kaiser Co. He was an Associate Editor of the California Law Review and was elected to Order of the Coif. He received his LL.B. in 1952. In the Fall of that year he associated with the firm of Latham & Watkins, where he is presently practicing. He was admitted to the California Bar in 1953.

[1]United States v. Addyston Pipe Co., 85 Fed. 271, 281 (6th Cir. 1898), aff'd 175 U.S. 211 (1899); 2 Restatement, Contracts §516 (1932).

[2]The question was left undecided in Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 99, 130 Pac. 1180 (1913).

tions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." This rule now appears as Section 16600 of the Business and Professions Code. Employee contracts not to compete appear to fall under this ban, not being specifically excepted. They have been held invalid in other jurisdictions where similar statutes apply.[3]

On the other hand, certain types of employee competition are tortious and may be restrained as unfair competition. The use of trade secrets, including customer lists, and the solicitation of former customers, have been enjoined many times by the California courts.[4]

A broader agreement being void, employers in highly competitive businesses will be well-advised to insert in employment contracts a proscription of conduct involving these court-formulated elements of unfair competition. At least this will remind the employee of his obligation, although its enforceability may be doubtful. The argument for its validity under the statute is that a contract merely restraining unfair competition is not a contract restraining anyone from engaging in a "lawful" trade or business.[5] And enforceability would become important if a liquidated damages clause were linked to the covenant not to engage in unfair competition. But the principal reason for insertion of such a provision would be its deterring effect. It should be included regardless of enforceability unless doing so either would nullify other provisions of the employment contract or would prevent obtaining court relief for torts actually committed. It appears that neither of these results would follow. The cases indicate that agreements violative of section 16600 do not render void the other provisions of contracts of which they are a part,[6] and, further, that relief from unfair competition will be

(Continued on page 14)

[3]Davis v. Jointless Fire Brick Co., 300 Fed. 1 (9th Cir. 1924) (California law); E. S. Miller Laboratories v. Griffin, 200 Okla. 398, 194 P. 2d 877, 3 A.L.R. 2d 519 (1948); Olson v. Swendiman, 62 N.D. 649, 244 N.W. 870 (1932).

[4]The cases are collected and analyzed in Hays, The California Law of Uniform Competition Takes a Turn—Against the Employer, 41 Calif. L. Rev. 38 (1953). Compare particularly the following recent cases: George V. Burdusis, 21 Cal. 2d 153, 130 P. 2d 399 (1942); Continental Car-Na-Var Corp. v. Moseley, 24 Cal. 2d 104, 148 P. 2d 9 (1944); and Aetna Building Maintenance Co. v. West, 39 Cal. 2d 198, 246 P. 2d 11 (1952).

[5]Cf. Glucol Mfg. Co. v. Schulist, 239 Mich. 70, 214 N.Y. 152 (1927) (statute did not apply to trade secrets); Lab. Code §2860 (everything acquired by employee during employment except pay belongs to employer); Matzen v. Horowitz, 102 C.A. 2d 884, 892, 228 P. 2d 841 (1951) (covenant not to steal customers implied).

[6]Joy Mfg. Co. v. Julian Petroleum Corp., 208 Cal. 168, 171, 280 Pac. 952 (1929); cf. City Carpet Beating Works v. Jones, 102 Cal. 506, 36 Pac. 841 (1894); civ. Code §1599.

Suggested Application of the Pre-Trial Conference

By James R. Ross*



James R. Ross

Los Angeles has become a complex urbanized area wherein recourse to the judiciary has habitually become the only practicable means of determining adverse rights of citizens. Litigants have had to contend with many inconveniences of which crowded court calendars, an insufficient number of judges, and a delayed court hearing, are typical. Too often trials have been unduly prolonged and expensive with unnecessarily pleaded issues and unprepared counsels.

The pre-trial conference is a judicial technique which with proper usage can eliminate or at least diminish the adverse public opinion toward the bar and courts caused by these inconveniences. It involves a preliminary discussion of the case between the opposing attorneys and a judge for the purpose of eliminating defenses which tend to impede and obstruct the administration of justice by unnecessary delay shortening the length of the trial by encouraging counsel to stipulate facts not material in dispute, simplifying issues, stabilizing the court calendar, and bringing about settlements.[1]

To be adopted in Los Angeles County the pre-trial hearing must first overcome a larger obstacle than has faced any other equivalent

---

*James R. Ross is a native of Independence, Missouri, although he moved to Los Angeles at the age of one year.

He attended public school in Los Angeles and is a graduate of Woodrow Wilson High School in Long Beach, California.

After serving with the United States Coast Guard for three years during World War II, he enrolled at the University of California at Los Angeles in 1946, from which he was graduated in 1949 with a Bachelor of Arts degree, majoring in Political Science. While there he was an active member of the Sigma Pi Fraternity, and participated in intercollegiate athletics on both the football and track teams. This interest has continued and he is now an active participant in Bruin Alumni affairs.

He is a graduate of Southwestern University, where he received the degree of Juris Doctor in June 1953, and was subsequently admitted to the California State Bar in January of 1954.

He is associated with the law firm of Sherman, Thompson & Glover, with offices at 5657 Wilshire Boulevard, Los Angeles. He is married and at present resides in Los Angeles.

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[1]Comments, "Committee Report on Pre-trial Procedure in the Federal Courts," 4 F.R.D. 83 (1944).

area. Los Angeles is the only metropolitan area in the country that has had experience with the pre-trial conference and then has abandoned the procedure.[2] Despite this unsuccessful attempt and the current ineffectiveness of the pre-trial in the federal district for Southern California, the pre-trial in some form is a necessity in Los Angeles County and is rapidly approaching a reality in the State of California. In 1952 the California Legislature by resolution requested the Judicial Council to study the pre-trial conference as used in other jurisdictions and to make a report of its findings.[3] Also the Judicial Council in August of the same year accepted the recommendations of its committee on pre-trial procedure to adopt the pre-trial for the Superior Courts of California, and to establish the program on an experimental basis for the study of the particular type of procedure most applicable to California.

For the express purpose of experimenting with the pre-trial conference, Judge Clarence Kincaid was transferred from Los Angeles County to the Desert Sessions ranch of Riverside County Superior Court in February, 1952. The results of this pre-trial experiment were gratifying. Fifty per cent of the cases, which included all types, were settled without necessity for trial and with no pressure from the court; and the attitude of the bar changed from one of distrust and suspicion to one of favoring the procedure.[4] During the past year several outlying municipalities such as Glendale, Pasadena, and Santa Monica have experimented with the pre-trial conference, to some extent, with satisfactory results. Also Judge Kincaid has completed an extensive tour of other jurisdictions employing the pre-trial and he has reported his findings to the Judicial Council.

The fact that the Judicial Council is now experimenting with the pre-trial suggests that Los Angeles County will be one of the areas for its application. Therefore, if the pre-trial conference is to become an integral part of the judicial process in the near future, the necessary administration in regard thereto must be determined.

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[2]Niles, "Pre-trial," 11 Md. L.R. 300 (1950).

[3]California State Legislature (1952); *"Resolved by the Senate of the State of California, the Assembly concurring,* as follows: (1) The Judicial Council is requested to make a study of the subject of pre-trial practices, including procedures employed in other jurisdictions, with a view to ascertaining whether the adoption of a pre-trial system in California would facilitate the disposition of civil cases and serve to relieve congested calendars or otherwise improve the administration of justice, and to report the result of its studies and its recommendations to the Governor and Legislature not later than the 10th legislative day of the next Regular General Session of the Legislature."

[4]Kincaid, "Pre-trial in our Superior Court," Cal. B. J. Vol. XXVII, No. 3 (1952).

Brothers-In-Law

By George Harnagel, Jr.



George Harnagel, Jr.

Whatever may happen to them thereafter, newly-admitted lawyers in **Minnesota** don't go hungry on the day they receive their license to practice. The State Bar sees to that by tendering them a luncheon following the swearing in ceremonies before the Supreme Court.

* * *

The **Toledo** Bar Association has set up a Civil Liberties Committee charged with the following duties: "First, to seek out any local police and court practices which may violate constitutional guarantees; second, to prepare 'friend of the court' briefs in cases where there appears to be a violation of civil liberties; and, third, to form a panel of attorneys to defend individuals threatened with any deprivation of civil liberties."

* * *

"At the recent institute on Creditor's Remedies at [the Law School of **Michigan** University] one of the prize all-time campus bloopers was carried out with the greatest of innocence.

"Russell A. Smith, professor of law and secretary of the law school, was to speak on 'Fraudulent Transfers and Conveyances' . . .

"Henry A. Montgomery . . ., the distinguished president of the Detroit Bar Association, commenced the pleasant task of introducing lecturer Smith (whom he did not know, personally). Montgomery did a wonderful job. No Smith had ever been introduced so smoothly to his assignment. Whereupon, Professor Smith stepped to the podium amid applause and snickers, announced his gratitude for the excellent introduction and modestly acknowledged that he did not measure up to the pattern cut by the fine words of the moderator.

"The professor was dead right. Montgomery had given to the better than 500-person audience the biographical data of Professor Russell E. Smith of the Montana State University School of Law.

It seems that both Smiths are listed on the same page of the Teachers' Directory of the Association of American Law Schools." —*Michigan State Bar Journal.*

* * *

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* * *

The **Indianapolis** Bar Association has $180,000 in cash in its treasury which was left to it for the purpose of establishing a headquarters for the Association.

* * *

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Mr. Justice Oliver Wendell Holmes.

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Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of September and October, 1929, by A. Stevens Halsted, Jr.



A. Stevens Halsted, Jr.

Fifty-three per cent of the applicants from Los Angeles have passed the Bar Examination. Among the successful candidates receiving congratulations are: **Frank S. Balthis, Jr., Joe Crail, Edward H. Gaylord, Jack W. Hardy, Frank Randolph Karr, Frank McNamee, Jr., Thomas Wilson Nobles, Robert E. Paradise, Herbert V. Walker** and **Frank B. Yoakum, Jr.**

* * *

Rupert B. Turnbull has been appointed a Referee in Bankruptcy matters in the United States District Court by **William P. James,** Senior District Judge. **Earl E. Moss** and **James L. Irwin** are already serving as Referees.

* * *

On October 24th the Wall Street stock market smashed down $5,000,000,000 in an avalanche of selling, one stock declining 96 points. Total sales on the Big Board were 12,894,650 shares, as compared with the 8,246,000 share record set on last March 26th. A total of 974 separate issues were traded on the Exchange. On October 29th sales on the N. Y. Stock Exchange totalled 16,410,030 shares. During the day stock prices virtually collapsed, swept downward with gigantic losses in the most disastrous trading day in the stock market's history. Billions of dollars in open market values were wiped out as prices crumbled under the pressure of liquidation of securities which had to be sold at any price. One million persons, it is said, have been speculating in stocks. The break in Wall street prices are sending home in a hurry many Americans who have been enjoying themselves in Europe on paper profits.



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Clyde C. Shoemaker and **Norman A. Bailie** are serving as delegates from the Los Angeles Bar Association at the annual convention of the American Bar Association being held during October in Memphis. A number of other local attorneys are also attending the convention as a tribute to **Gurney E. Newlin,** Los Angeles attorney, who has been president of the A. B. A. during the past year.

* * *

The Philadelphia Athletics beat the Chicago Cubs 4 games to 1 to win the 1929 World Series.

* * *

Before a gathering of scientists, government officials and members of the diplomatic corps, President Hoover presented **Mme. Marie Curie,** co-discoverer of radium, a draft for $50,000 to purchase a gram of the mineral as a gift from her American admirers.

* * *

At the annual convention in Del Monte in October, four candidates are in the field to succeed **Frank James** who retires from membership on the State Bar Board of Governors. They are **Henry G. Bodkin** of Los Angeles, **Roland G. Swaffield** of Long Beach, and **Frank Shoemaker** and **Frank Weller** of Glendale.

* * *

Superior Judges **Clair S. Tappaan** and **Thomas C. Gould,** with Judge **Carlos S. Hardy,** are the three judges to hear the contempt proceedings against Rev. **R. P. Shuler** and Rev. **Gustav A. Briegleb** arising out of statements alleged to have been made by them over the radio and in sermons, concerning the Lois Pantages jury trial. Attorneys **Jennings, Shinn** and **Vickers** will be the members of the Bar Association who will present the case against the two ministers.

* * *

British Premier, **J. Ramsay MacDonald,** and his daughter, Miss Ishbel, visited New York and Washington. Conferences were held with **Henry L. Stimson** on disarmament looking to a Five-Power naval conference at London next January.

AGREEMENTS NOT TO COMPETE

(Continued from page 6)

granted in spite of the presence of an invalid clause restricting competition.[7]

Subsequently-enacted statutes narrow the rule of section 16600 with respect to certain contracts prohibiting competition *during the term* of a contract of employment. Labor Code section 2855 and similar statutes[8] permit enforcement by injunction of contracts calling for the performance of personal services of a "special, unique, unusual, extraordinary or intellectual character." Where such services are involved, competition by an employee can be prevented during the contract period.[9] These statutes embody an accepted equity doctrine which, however, has been applied almost exclusively in litigation involving the services of entertainers.[10] Its application to other business fields will be considered subsequently.

Contracts Ancillary to the Sale of a Business

Only two exceptions are made to section 16600's prohibition of contracts in restraint of trade. The first permits the seller of the good will of a business, or a shareholder who disposes of all his shares in a corporation, to agree not to carry on a similar business within "specified" counties or cities in which the business sold has been carried on, for the life of the business sold.[11] The second permits partners to agree that they will not compete, upon dissolution of the partnership, within the "same city or town" where the partnership business was transacted.[12] Both exceptions are designed to protect successor owners of a business from the competition of those knowing most about it, its former owners, in the limited area in which the business has been operated. The promise not to carry on a similar business may[13] and should include the seller's competition as the agent or employee of a competitor.

An injunction is, of course, the usual remedy for breach of a covenant not to compete. In connection with its issuance an award is proper for damages suffered during the intervening period.[14]

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[7]Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 99, 130 Pac. 1180 (1913) (covenant showed intent of parties even though validity not ruled upon); Davis v. Jointless Fire Brick Co., 300 Fed. 1 (9th Cir. 1924).

[8]Civ. Code §§3422 (1)-(2), 3423 (5); Code Civ. Proc. §526.

[9]See 5 Williston, Contracts §1450 (Rev. ed. 1937). Compare, however, the dictum in Loew's Inc. v. Cole, 185 F. 2d 641, 657 (9th Cir. 1950).

[10]See 5 Williston §§1447 et seq.; Tannenbaum, Enforcement of Personal Service Contracts in the Entertainment Industry, 42 Cal. L. Rev. 18 (1954).

[11]Bus. & Prof. Code §16601.

[12]Bus. & Prof. Code §16602.

[13]Meyers v. Merillion, 118 Cal. 352, 357, 50 Pac. 662 (1897).

[14]General Paint Co. v. Seymour, 124 Cal. App. 611, 614, 616, 12 P. 2d 990 (1932).

Provisions for liquidated damages are enforceable;[15] should an injunction ultimately appear more desirable, their inclusion in the contract will not affect the court's power to issue the latter decree.[16]

The ancillary sale of good will required by section 16601 can be found by implication if it is not expressed. In one case the sale of good will was inferred from a sale of the property to which good will normally adheres and from the presence of the covenant itself, which was accordingly enforced. The plaintiff's carelessness was not, however, without its moral. The contract also omitted any reference to a sale of the business name. As a consequence the court permitted a subsequent sale of the name to a competitor of the buyer.[17] The tax dangers of relying upon implication of a sale of good will will be discussed below.

In defining the territorial scope of a contract not to compete, the parties frequently overlook the precise restrictions imposed by the statute. For example, a covenant given in connection with a sale of good will should, but seldom does, "specify" each city or county in which the business was carried on. Nevertheless, the courts will give restricted effect to a contract which is too broad, as where its operation purports to cover the entire state,[18] or is unrestricted,[19] by limiting a decree of enforcement to the territory permitted by the statute.[20] A court confronted with the parties' stipulation that the business was then being carried on in the areas to be covered by the covenant might be more easily persuaded to give effect to the parties' definition of scope.

Competition by the Seller's Officers

Section 16601, although permitting some ancillary contracts, does not cover situations where the individual whose competition is feared is not the nominal seller of good will. Suppose the business in question is to be purchased from a corporation controlled by one shareholder, who is also its active manager. One party may refuse to consider a sale of stock and insist that the corporation sell the

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[15]Potter v. Ahrens, 110 Cal. 674, 680, 43 Pac. 388 (1896). Franz v. Bieler, 126 Cal. 176, 182, 56 Pac. 249, 58 Pac. 460 (1899) (even though scope of covenant too broad).

[16]Johnston v. Blanchard, 16 Cal. App. 321, 325, 116 Pac. 973 (1911); Bradshaw v. Millikin, 173 N.C. 432, 92 S.E. 161 (1917).

[17]Mahlstedt v. Fugit, 79 C.A. 2d 562, 567, 180 P. 2d 777 (1947). As to sale of tradenames see Bus. & Prof. Code §§14100 *et seq.*

[18]General Paint Co. v. Seymour, 124 Cal. App. 611, 614, 12 P. 2d 990 (1932).

[19]Mahlstedt v. Fugit, 79 C. A. 2d 562, 566, 180 P. 2d 777 (1947).

[20]City Carpet Beating Works v. Jones, 102 Cal. 506, 36 Pac. 841 (1894); cases cited in notes 18 and 19, *supra*.

assets in question.[21] The buyer, although anxious to obtain a covenant from the corporate seller, will be even more concerned with future competition by the shareholder. Section 16601 permits a restrictive covenant from a "person who sells the good will of a business," in this case the corporation, or from a "shareholder . . . disposing of all his shares." Our owner-manager fits within neither classification. In view of the fact that it required an amendment of the statute to render shareholder covenants enforceable,[22] it appears unlikely that his covenant would be held valid.

If his services are to be employed by the buyer for a stated period of time in order to smooth the transition between managements, the problem of his possible competition might be solved by including a promise not to compete during the term of the employment in the employment agreement. His job with the buyer would make competition less likely, and the covenant would stand as an additional deterrent. The case for its enforcement would be based on the code sections discussed above[23] which provide for equitable relief in the case of the breach of a contract for personal services of a special, unusual, unique, extraordinary or intellectual character, where the loss of such services is not capable of adequate or reasonable compensation in damages. The compensation under the contract must be not less than $6,000 per year. It does not seem far-fetched to consider the services of a former manager of the business, who is not only skilled in his field but is also experienced in operating the particular business and in dealing with its customers, sufficiently unique to justify their assimilation to the services of entertainers (against whom the rule of equity codified in these code sections is traditionally invoked).

Ordinarily, however, the services of the former owner will not be desired, at least for long. The contract for unique personal services again suggests itself as a possible justification for enforcement of a negative covenant. In such a case, the contract would call for the rendition of consultative services which would probably be seldom requested, although compensation would be paid for their

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[21]The parties should not overlook the possibility that a distribution of assets to the shareholder and his sale of the assets to the purchaser would not only render the stockholder's covenant valid but might be feasible for both parties from a tax standpoint. See the Internal Revenue Code of 1954, in relation to the rule of U.S. v. Cumberland Public Service Co., 338 U.S. 451 (1950).

[22]Shareholder covenants were held void on the theory that only the corporation could sell its good will, in Chamberlain v. Augustine, 172 Cal. 285, 156 Pac. 479 (1916), and Merchants' Ad. Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468 (1899). The statute was amended in 1945.

[23]*Supra* note 8.

availability. If the negative covenant were broken, the primary difficulty in invoking equitable relief would lie not in the character of the services, although these would become less unique with the passage of time, but in the nature of the damage provable by the buyer. The statutes providing for enforcement of contracts for unique services seem designed to protect the employer from the loss of services, not the loss caused by the employee's competition. A failure to use the services would indicate their dispensability and seem to destroy the basis for equity jurisdiction. If enforcement is to be available, more than a token use of the services will be required.

Tax Consequences

The duration of ancillary covenants may extend for the life of the business transferred. Paradoxically, it may be desirable not to take advantage of the statute's breadth in this instance and to provide for a shorter duration. Here is one example of how the very serious tax consequences attendant upon the use of such covenants may dictate the form which they take. Unless a covenant not to compete is for a fixed period the purchaser may not depreciate its cost through yearly tax deductions.[24]

The purchaser's tax problems revolve around the fact that he may not depreciate the cost of the good will itself.[25] He must therefore be able to show that the parties dealt separately with good will and the covenant, and assigned a definite value to the latter.[26] Otherwise he may deduct nothing.[27]

A tax break for the purchaser means a corresponding tax burden for the seller who gives the covenant. Income received for an agreement not to compete is taxed at ordinary rates;[28] income attributable to a sale of good will is taxed as capital gain.[29] When a transfer of good will is accompanied by a covenant not to compete (as it must be to make the covenant valid) and the parties have bargained over the separate value of each of the two items, the income attributable to the covenant will be taxed as ordinary income.[30] In attempting to avoid this result, the seller will bargain to avoid any allocation between good will and his promise not to compete.

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[24]Regs. 118, sec. 39.23(1)-3.
[25]*Ibid.*
[26]Commissioner v. Gazette Telegraph Co., 209 F. 2d 926 (10th Cir. 1954).
[27]Harold J. Burke, 18 T.C. 77 (1952).
[28]Rodney B. Horton, 13 T.C. 143 (1949).
[29]Aaron Michaels, 12 T.C. 17 (1949).
[30]Hamlin's Trust v. Commissioner, 209 F. 2d (10th Cir. 1954).

Perhaps only one of the parties will recognize the tax problem. However, if both buyer and seller are considering taxes, the parties will have to determine where the tax burden is to fall, take it into account in the purchase price, and make their acts and contract consistent with the determination. In setting up the transaction primary emphasis should be placed on establishing that the covenant not to compete was (or was not) the subject of separate bargaining by the parties, which established (or did not establish) a reasonable and independent value for the covenant.

Indeed, it might seem that a separate value could best be established by making the covenant the subject of a separate contract. However, the two contracts would be integrated for tax purposes in any event, while the separation of the sale contract and the covenant would make validity less certain under California law. The statute does not require that the agreement not to compete be a part of the sale contract, but the questionable improvement in tax position would not ordinarily justify any risk of substantive invalidity.

Enforcement Outside of California

The nineteenth century origins of the statutes regulating covenants not to compete are vividly illustrated by the satutory assumption that a partnership business is transacted in only one city or town. Today, a business will often have regional or national scope. Protection from competition must be planned on the same scale.

Under the less restrictive common law rules relating to these covenants,[31] it is likely that enforcement obtainable elsewhere than in California will be more nearly commensurate with the needs of the employer or purchaser.

Maximum protection would appear available through the use of an "accordion" clause. The parties would stipulate that a restraint of specified breadth was reasonably necessary to protect the buyer or employer.[32] They would further declare the intention (1) to obtain no more than the maximum restraint legally available in the jurisdiction in which enforcement was sought, and (2) that the agreement should be enforced only to such extent. This declaration of intention would not only recognize that a covenant made in a more liberal jurisdiction can not be enforced in a more restrictive

[31] 5 Williston §§1641, 1643.

[32] There should in fact be a reasonable basis for the covenant's breadth. An attempt to obtain more than any court would reasonably allow would invite a holding that the entire covenant was void because deliberately oppressive. See 5 Williston 4685.

state contrary to the latter's public policy.[33] It would in addition avoid any question of severability.

The apparent difficulty with such an agreement if executed in California, is that the California statute declares that unauthorized agreements in restraint of trade are "void." Since generally the law of the place of contract execution controls the question of formal validity,[34] any contract not sanctioned by California law might be held void if executed here, regardless of where a suit for enforcement was brought. It is not the purpose of this discussion to predict the application of the rules of conflict of laws. However, the difficulty may at least be alleviated by the parties' stipulation as to controlling law,[35] and consideration should be given to a provision that all questions respecting the validity of the covenant should be governed by the law of the place where enforcement is sought. While it is far from certain that all courts would honor the provision its inclusion would be decidedly preferable to the usual provision that California law shall control all matters of interpretation.

Conclusion

Rigid application of the California rules limiting agreements not to compete can be tempered in some instances by drafting and by choice of the form a transaction takes. Particularly is this true with respect to covenants ancillary to the sale of a business. Their treatment also determines the availability of capital gains and of tax deductions. The obvious bearing which these matters have on the value obtained by the buyer or seller of a business requires their careful consideration during the negotiation of the sale itself.

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[33]Davis v. Jointless Fire Brick Co., 300 Fed. 1 (9th Cir. 1924).
[34]Restatement, Conflict of Laws §332 (1934); 6 Williston §1792.
[35]See Note, 62 Harv. L. Rev. 647 (1949); Hal Roach Studios v. Film Classics, 156 F. 2d 596 (2d Cir. 1946); Ringling Bros.-Barnum & Bailey Shows v. Olvera, 119 F. 2d 584, 586 (9th Cir. 1941).

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SUGGESTION PRE-TRIAL CONFERENCE

(Continued from page 8)

The following sections will be devoted to the exploration and determination of all possible problems which may confront said administration.

Employment of pre-trial

The question arises as to whether the pre-trial conference should be optional, mandatory, or at the discretion of the judge. The first alternative of optional may be quickly discarded as this method was partly responsible for the failure of the Los Angeles experiment. There is a marked difference of opinion concerning the remaining two alternatives. Some members of the bench have expressed the view that the pre-trial should be at the discretion of the judge as all trials do not benefit by this hearing, therefore, time is wasted. They believe that a pre-trial judge should be able to determine from the pleadings if a conference would be advantageous.[5] The other faction takes the position that in Los Angeles County any procedure less definite than mandatory would be doomed to failure. They insist that the bar as whole does not favor the hearing and would not use it unless required to do so. There is an assumption that the conference is of some benefit in all civil cases, although some profit more than others.[6] In June, 1952, the Southern District of New York accepted this thought and made pre-trial mandatory for every civil case.[7] Therefore, it is evident that the pre-trial conference should be mandatory in every civil case until such time as the courts have determined that a particular type of case does not benefit by this procedure.

Binding effect of pre-trial "order"

There is a conflict as to whether the "order" should be binding, or merely advisory. Those of the bench and bar interviewed, with one notable exception, believed that the "order" should be binding on the active trial with, of course, the right to bring in newly discovered evidence. There is a twofold reason for making the order binding: first, this is the only way to obtain the cooperation of the bar; second, if advisory only, the hearing would merely be a means of trying the case twice. The dissenting member of the bench interviewed believed that the order should be advisory in regard to the law applicable to the case. This difference of opinion is also prevalent in the decisions of other jurisdictions. Some decided that a

[5]Yankwich, "Short Cuts in Long Cases," 13 F.R.D. 41 (1952).
[6]Delehant, "Pre-trial Conference in Practical Employment: It's Scope and Technique," 28 Neb. L.R. 1 (1948); wherein Judge Delehant states, "there is no type of civil action that a contribution cannot be made by pre-trial."
[7]McAllister, "Pre-trial Practice in the Southern District of New York," 12 F.R.D. 373 (1952).

pre-trial order is not binding on the active trial judge as said judge must be allowed to control his own case.[8] The rest of the jurisdictions held that the pre-trial order is binding on the trial judge and that the admissions made at the hearing are as decisive as if made at the active trial.[9] In conclusion it appears that the pre-trial order should be binding as the better authorities, as well as the better reasoning, support this view.

Time of hearing

Of the authorities interviewed there is a diversion of opinion as to when the pre-trial should be held which varies from ten to thirty days prior to active trial. Theoretically, the advantage of holding the hearing as soon after the pleadings are filed as possible is to avoid the unnecessary expense of proceeding under the discovery devices. However, the only place this was ever attempted was in Wayne County, Michigan, where the results were unsatisfactory.[10] Recently this county has gone back to its original system with excellent results, but now, of course, they have a cooperative and experienced bar. Pre-trial should be held close enough to the active trial to maintain the same conditions and yet far enough in advance to avoid some of the expense of trial preparation. The period that has worked most effectively in the federal courts has been from one to three weeks prior to actual trial. It is interesting to note that in the recent experiment by Judge Kincaid in Indio the pre-trial was held three weeks in advance.[11] Therefore, a conclusion may be drawn that the pre-trial hearing should be held from two to three weeks before the active trial, with elasticity allowed for setting of the cases on the master and pre-trial calendars.

Participants in conference

The question of participants is of primary importance as admissions made at the hearing are contained in the pre-trial order and therefore, are as decisive as if made at the active trial.[12] There is a divergence of opinion on this matter as some of the bar interviewed felt that if the litigants were not present, an attorney could make admissions which would be contrary to his client's best interest. However, in the surveys of Federal Rule 16 this objection was

[8]La Plante v. Implement Dealers Fire Ins. Co., 216 No. Dak. 393; 12 N.W. 2d 630 (1944).
[9]Gurman v. Stow-Woodwar Inc., 302 Mass. 442 (1944); Kings v. Edwards Lumber Co., 8 F.R. Ser. 16.32, Case No. 3 (1945).
[10]Comments, "Pre-trial Hearings and Assignment of Cases," 33 Ill. L.R. 699 (1939).
[11]Id., sec. 4.
[12]Miles Laboratories Inc. v. Seignigous, 30 Fed. Sup. 549 (1940).

far outweighed by the advantage of obtaining a calm and informal atmosphere with only the judge and the two counsels present. When the litigants are present the atmosphere inevitably becomes one of controversy and antagonism, leading to demonstrations of advocacy by the lawyer to impress the client. This tends to destroy informality and calmness. The fact that a reporter is present at the proceedings tends to cause a loss of informality as would the presence of any disinterested party. Hence, the conclusion may be reached that a judge and the two attorneys only should be present for the pre-trial. However, there should be a rule that upon the request of either attorney, the pre-trial judge would state from the bench for the litigants the ruling or order as decided in the hearing. In this way the judge, himself, could explain to the clients the reasons for said decision, which would destroy any unfavorable impressions they might have of the closed hearing.

Place of hearing

There is a division as to whether the hearing should be held in the courtroom or in chambers. Those who believe that the pre-trial should be in open court with a court reporter state that dignity is lent to the proceedings. They feel that a conference in chambers would be too relaxed and would give the judge an opportunity to force settlements. Those who think that chambers is the better place to hold the hearing state that here is the proper atmosphere to diminish the red tape and formal dignity of the trial. In resolving this problem the conclusions of other jurisdictions must be considered. Although results of the pre-trial have been successful when held in either place, there is a preferenc for chambers: federal courts preferred chambers two to one;[13] Illinois used chambers exclusively;[14] the Indio experiment was held in chambers.[15] This preference for chambers stems from a desire of pre-trial judges to obtain informality. So, in conclusion, if this is to be the goal, the conference should be held in chambers.

Preparation by Counsel

All members of the bench and bar interviewed, agreed that counsel should be prepared to present at pre-trial the law and facts upon which he bases his case or defense. If the lawyer is unprepared, the conference is a waste of time for all concerned and accomplishes

[13]Shafroth, "Pre-trial Techniques of Federal Judges," 4 F.R.D. 83 and Id., sec. 1.
[14]Fisher, "Judicial Meditation: How it Works Through the Pe-trial Conference," 10 Univ. of Chi. L.R. 453 (1943).
[15]Id., sec. 4.

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nothing. An attorney may be forced to prepare by being required to submit a memorandum of his case by which he is bound. However, this rule of holding counsel to his memorandum at pre-trial must be tempered with an exception whereby newly discovered evidence can be introduced. Of course, this exception would throw a heavy burden on the attorney to show that any evidence was "newly discovered."

Sanctions to enforce pre-trial

The determination that counsel must be prepared introduces the problem of sanctions that can be employed against a lawyer who is unwilling to comply with accepted procedures. All reports of other jurisdictions have stressed the fact that the bar has cooperated. But, if there were such an instance wherein the lawyer refused to cooperate, the case could be dismissed or a summary judgment could be granted on the grounds of default.[16] Another sanction against an unprepared attorney would be to grant a continuance. Although this is more likely to be of success against a plaintiff's attorney, it is also an effective means against the defendant's attorney where the actual defendant is an insurance company as they must keep reserves to cover possible judgments. There is also the power to hold one refusing to cooperate in contempt of court.[17]

Forcing settlements

The objection by the bar that a pre-trial becomes a means of forcing settlements is well founded. In many jurisdictions, especially Chicago, Illinois, the pre-trial has become a procedure in which settlement is the paramount objective.[18] Advocates of this procedure believe that the so-called evil of forcing a settlement is in reality no different than some means used today. They are referring, of course, to the practice of a judge calling counsel into chambers during active trial wherein he states to one counsel that he is wasting his time or that it would be better to compromise thereby saving all concerned both time and expense. Irrespective of this view, the pre-trial in Los Angeles County should never be allowed to reach this stage. Settlements should be regarded as a by-product rather than as an objective. This latter theory is followed in the federal courts,[19] as well as in other jurisdictions.[20] However, it should not be understood by this latter theory that any mention of settlement

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[16]Berger v. Brannon, 172 F. 2d 241 (1949).
[17]California Civil Code of Procedure, Sec. 128.
[18]Id., sec. 14.
[19]Id., sec. 1.
[20]Klitz v. Herm, 242 Wis. 456 (1943).



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is taboo. The judge should ask if there has been a discussion of settlement but only after all other aspects of the pre-trial have been decided. By having the court initiate the discussion, it eliminates the embarrassment of the attorney who would otherwise have to start the discussion and thereby intimate that he lacks confidence in his case. In addition, the pre-trial judge should not be allowed to include any of this conversation in his order, as this would tend to limit free and open discussion thereon.

Assignment for pre-trial

Because of the present master calendar situation it is impossible to allow each individual judge to ascertain the time for pre-trial. In a metropolitan area such as Los Angeles County, the only practical answer would be the establishment of a pre-trial calendar upon which every civil case is entered. From this calendar all counsel would be notified two weeks in advance of their hearing date. Once the conference is completed it would be the responsibility of the pre-trial judge to see that his case received a date for active trial on the master calendar. California has declared the use of the pre-trial calendar to be valid and a distinct procedure from the active trial calendar.[21]

Presiding Judge

Some members of the bar and bench believe that the same judge should handle both the active and the pre-trial, reasoning that much of the familiarity would be lost by assigning a different judge. The rest believe that the judge's actions in the active trial will be prejudiced if he presides over both, and hence, the frank discussion of matters so necessary in pre-trial would be impaired. In Los Angeles County the problem is solved when the practical aspects are considered. In this county where there are almost eighty superior court judges, some of them are not prepared to cope with the pre-trial adequately as they do not have a large trial experience behind them. Also if each judge was to hold his own pre-trial, there would be mass confusion in the calendar situation as some courts would be idle while others would be overloaded. Although the federal courts use the same judge for both, this is not analogous as there is no master calendar problem. New Jersey, however, has assigned certain judges to do pre-trial work only.[22] Los Angeles should study this state's procedure as the two areas do have analogous conditions.

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[21]Union Oil Company of California v. Hane, 27 Cal. App. 2d 106 (1938).
[22]Ackerson, "Pre-trial Conference and Calendar Control: The Keys to Effective Work in the Trial Courts," 4 Rut. L.R. 381 (1950).

Several members of the bench have suggested that two or three men who are competent long-term trial judges, are well-versed in pleadings, and are courageous in determining questions of law, be selected to handle the entire pre-trial work. It is hoped in this way that pre-trial specialists may be developed.

Objections by Bar to pre-trial

Many members of the bar contend that the pre-trial consumes time which a busy trial lawyer cannot afford to lose. In particular they point out that by the time a negligence case comes to trial the issues are well-defined and there is no chance of settlement. To substantiate this claim they explain that the discussion of liability and damages between the time contact is made by the insurance adjustor and the actual trial constitutes an extra-judicial pre-trial. This is undoubtedly true in many instances, but the overall picture and not the individual case must be considered. The decisions reached under Federal Rule 16 show that the pre-trial shortens the actual time spent on a case by the following means: narrows issues;[23] simplifies issues, clarifies pleadings and avoids unnecessary proof at the trial;[24] limits the proof;[25] and ascertains what material facts are actually and in good faith controverted.[26] The possibility of settlement is, of course, another primary means of shortening time spent on a case. The results of all these conditions are to bring about a shorter trial and to lessen preparation on the part of the counsel. Thus, pre-trial does not require additional time but actually is a saving of time to the lawyer.

Those with an unfavorable opinion of the pre-trial conference have also pointed out that it is a mere discovery in disguise. There appears to be four possible means by which an attorney may present his case at the pre-trial conference. Most federal courts in the early use of Rule 16 allowed the pre-trial to merely crystalize issues, amend pleadings, agree as to facts and law, and stipulate in regard to documentary evidence.[27] Those in favor of this procedure are firmly against any exchange of information which would tend to limit their "game of wits" during the active trial. This method of pre-trial is incomplete and could never function effectively without the full cooperation of the bar. Due to past experiences with the

[23]Klagen v. Cohen, 5 F.R.D. 2 (1945).
[24]McDonald v. Bowles, 152 F. 2d 741 (1945).
[25]Palmer v. The Lehigh Ry. Co., 5 F.R.D. 216 (1946).
[26]Krause v. George Garrett Co., 5 F.R.D. 385 (1946).
[27]Id., sec. 1.

pre-trial in Los Angeles County, this full cooperation would not be forthcoming from the bar.

Judge Kincaid at Desert Sessions required all documentary evidence, but no names of witnesses, be presented at pre-trial.[28] There is, however, a serious drawback to this procedure. It gives the advantage to the attorney who is relying on witnesses as he then knows the foundation upon which his opposition is basing his case. The opposing attorney relying on documentary evidence does not receive this same advantage.

If attorneys are compelled to include in their memorandum all law, facts, and names of necessary witnesses, full discovery results for both parties. This view is followed in the federal courts by those of the bench who believe that surprises as a legal tactic is no longer to be tolerated.[29] If it is assumed that the judicial process is a search for truth, there can be no objection to allowing both parties to have full knowledge of their opponent's case. However, this view is strenuously opposed by the leaders of the bar even though approved by laymen.

A theory suggested by one of the leading superior court judges

[28]Id., sec. 4.
[29]Teller v. Montgomery Ward, 30 F. Sup. 938 (1940).

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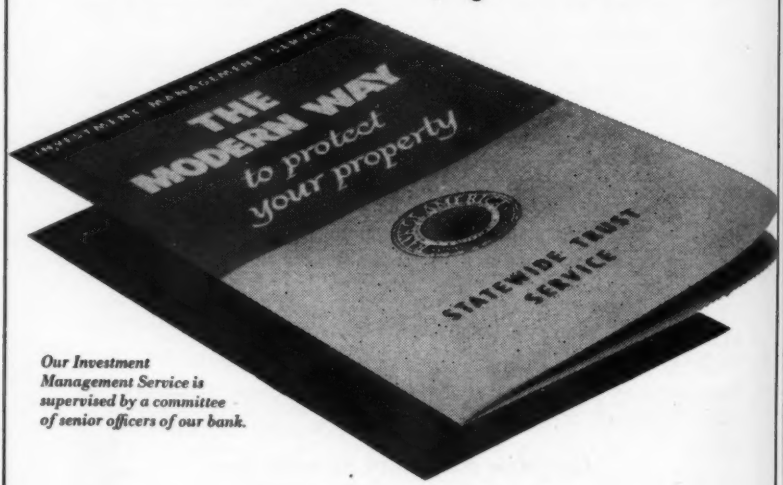
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of Los Angeles County provides a compromise to this controversial problem of procedure. He believes that attorneys should be required to produce all documentary evidence at the pre-trial conference but should be allowed to merely state that there is a witness to prove each fact in his memorandum. This suggestion appears to be the perfect solution at this time for Los Angeles County. This procedure would satisfy those who feel that in stating names of witnesses they open the way for tampering and perjury. It also eliminates the element of surprise. Finally, the advantage given to the counsel relying on witnesses rather than on documents would be destroyed.

Means of introducing benefits of pre-trial conference

If the pre-trial conference is to reach its most effective application in Los Angeles County the full cooperation of the bar must first be obtained. Only when the true purposes of the pre-trial are fully understood by the bar may this cooperation be realized. Texas was very successful in obtaining their bar's favorable attitude by conducting a series of informative lectures including the presentation of actual pre-trials by those well acquainted with the procedure.[30] The emphasis must be placed on the advantages of the hearing for the trial lawyer. The one in which he will be most interested involves the valuable amount of time which can be saved.[31] At all times it must be reiterated that the hearing is not mere discovery. All who express a dubious opinion must be informed that the effectiveness of the conference increases directly with the experience of the participants.[32]

The layman will welcome the introduction of the pre-trial conference to the judicial process. He will be more than willing to avail himself of a system which has eliminated the delay and expense so prevalent today. It will be the bar's responsibility to educate the public as to the advantages of this new technique. Each attorney must explain to every client how these benefits will affect the case in which said client is involved. All available means of

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[30]Comments, "The Pre-trial in Texas," 13 Tex. B.J. 435 (1950).

[31]Delehant, "Pre-trial Conferences in the Federal District Courts: Their Value for Counsel and for Judges," 35 J. Amer. Jud. Soc. 70 (1951); wherein Judge John Delehant states, "Pre-trial eliminates incalculable amounts of unnecessary and purposeless preparation both of law and in marshalling evidence, thereby saving the attorney both time and money."

[32]Comments, "Pre-trial in Iowa—Its Use and Misuse," 37 Iowa L.R. 345 (1952); wherein the Editorial Board of the Iowa Law Review states that as a result of its survey, it has found that "one of the reasons for lack of use of the pre-trial is the outright antagonism on the part of the bar. This antagonism is based upon two grounds: one, afraid of discovery before trial; two, a selfish motivation that it would shorten trial thereby reducing fee of the attorney," and id. Sec. 4.

communication should be used to further this presentation, but the attorney-client relationship will be the most effective. Taxpayers, too, will readily applaud the acceptance of the pre-trial conference for with it will come a more efficient use of public funds. Once the pre-trial conference has been exercised extensively in Los Angeles County, the problems as heretofore mentioned will be relieved or greatly diminished, and the judicial process will become more palatable to our society.

THE PRESIDENT'S PAGE

(Continued from page 2)

into the profession. Making our Placement Bureau more effective is one way of contributing to the acceptance of this responsibility.

* * *

You have probably noticed the article in the May-June issue of the *State Bar Journal,* page 196, on the California Law Revision Commission by its chairman, Thomas E. Stanton, Jr. This commission is a successor to the California Code Commission. The new commission, unlike its predecessor, is charged with the duty of recommending substantive changes in the law for consideration by the legislature.

The commission research headquarters will be at the Stanford Law School. The work done there will be under the direction of Professor John R. McDonough, Jr., Executive Secretary of the Commission.

If in the course of your day-to-day work you encounter defects, conflicts, ambiguities, or anachronisms in the California law, you are invited to send a note of them to Professor McDonough, School of Law, Stanford, California. There is no objection to your doing this by direct informal communication. If, however, you wish your proposal to receive study by our own Association before being sent to the Commission, you should address your comments to the Association office. We have asked all our standing committees dealing with various fields of law to co-operate in this program with respect to any problems encountered in their particular fields or which may be assigned to them for special study by our Board of Trustees. If you do write direct to Professor McDonough, please be kind enough to send a copy of your communication to the Association's office so that we may be informed and may co-ordinate our efforts with respect to matters submitted to the Commission for study.